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IN THE SUPREME COURT OF THE STATE OF IDAHO

MELALEUCA, INC., an Idaho corporation,

Plaintiff-Respondent,

-vs-

RICK FOELLER and NATALIE FOELLER,

Defendants-Appellants.

Supreme Court Docket No. 39757-2012

Bonneville County District Court Case
No. CV-2009-2616

* * * * * * * * * * * * * *

APPELLANT'S BRIEF

* * * * * * * * * * * * * *

Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
In and for the County of Bonneville
HONORABLE JON J. SHINDURLING, District Judge.

* * * * * * * * * * * * * *

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from an order granting Summary Judgment requiring the repayment of commissions as the measure of damages for the violation of Policy 20 in the Melaleuca Independent Marketing Executive Agreement. The commissions were paid to Rick and Natalie Foeller for a period before the termination of their relationship with Melaleuca, but after the Foellers are alleged to have violated Policy 20 in the agreement providing for the "forfeiture by the Marketing Executive of all commissions or bonuses payable for and after the calendar month in which the violation occurred." The order also denied the Foellers' Motion for Summary Judgment that the application of Policy 20 constitutes an unlawful forfeiture or penalty that is designed solely to deter a breach or punish the breaching party.

II. The Course of the District Court Proceedings and Disposition

1. On April 29, 2009 Melaleuca filed its *Complaint* and jury demand against the Foellers alleging breach of contract, intentional interference with economic advantage, and tortious interference with a contract.

2. On July 9, 2010, Melaleuca filed a Motion for Summary Judgment.

3. On December 1, 2010, the Court denied Melaleuca's Motion for Summary Judgment with the following reasoning:

> Melaleuca states that the [$23,856.41] amount requested is reasonable because it exactly matches the damages Melaleuca suffered as a result of paying commissions to the Foellers. This argument is unconvincing based on the evidence currently before this court. Melaleuca seeks to retroactively take money paid to the Foellers for sales commissions; there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers'

> work as contractors for Meleleuca or that these are recognizable damages. Rather, it appears that, lacking other evidence, Policy 20(c) acts solely to "deter a breach or to punish the breaching party."
> *Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment,* entered December 1, 2010, Clerk's Record on Appeal, page 64-65

4. Following completion of discovery, on October 19, 2011, Melaleuca filed a Motion for Reconsideration of the Court's decision denying Melaleuca's Motion for Summary Judgment.

5. On October 20, 2011, the Foellers filed a Motion for Summary Judgment.

6. On November 9, 2011 the Foellers filed motions to strike various affidavits filed in support of Melaleuca's Motion for Reconsideration.

7. The various motions were heard by the District Court on November 21, 2011.

8. On December 21, 2011 the District Court issued its *Opinion and Order on Plaintiff's Motion for Reconsideration* granting Melaleuca's Motion for Reconsideration, entering summary judgment in favor of Melaleuca in the amount of $23,856.41, and denying the Foellers' Motion for Summary Judgment. The court also denied the Foellers' Motions to Strike on the basis that it had not relied upon the affidavits for its decision. The reasoning for the court's opinion was:

> Without considering the argument now made by Melaleuca that commissions paid to marketing executives generally are not tied to any specific sales activity undertaken by them, the Court is now persuaded that Policy 20(c)(i) simply excuses Melaleuca from performing under a contract that has been breached by the other party. As cited by Melaleuca, the Idaho Court of Appeals has clearly held that "[i]f a breach of contract is material, the other party's performance is excused." *J.P. Stravens Planning Associates, Inc. v. City of Wallace,* 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct.App 1996) (citing *Ervin Constr. Co. v. Van Orden,* 125 Idaho 695, 700, 874 P.2d 506, 511

(1993)). "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *J.P Stravens,* 129 Idaho at 545, 928 P.2d at 49 (quoting *Ervin Const. Co.,* 125 Idaho at 700, 874 P.2d at 511.
Opinion and Order on Plaintiff's Motion for Reconsideration, entered December 21, 2011, Clerk's Record on Appeal, page 593.

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred by granting monetary damages based upon the defense of material breach of contract.

2. Whether the district court erred by failing to determine that the application of Policy 20 constitutes an unlawful penalty or forfeiture in the absence of evidence that Melaleuca suffered any actual damages and the amount of any such damages.

3. Whether the Foellers are entitled to attorney fees on appeal pursuant to Idaho Code § 12-120(3).

STATEMENT OF FACTS

Rick and Natalie Foeller entered into the agreement with Melaleuca, Inc. in September 1999. Pursuant to the agreement, the Foellers received commissions and prizes for selling Melaleuca's products and for enrolling other independent marketing executives with Melaleuca. The Foellers received monthly commission checks from Melaleuca for commissions and bonuses until September, 2008. The Foellers resigned as Melaleuca marketing executives on November 13, 2008.

Melaleuca withheld the Foellers' outstanding October, 2008 commissions in the amount of $7,968.00. On December 5, 2008, Melaleuca, through its Associate General Counsel, Justin Powell, sent the Foellers a letter, which stated as follows:

> Due to recent reports that you have recruited and attempted to recruit Melaleuca Customers and Marketing Executives to another business in violation of Policy 20, to which you are still bound. Melaleuca has the right to impose fines and recover damages, including by withholding from outstanding commissions and bonuses, to help offset the harm to Melaleuca and to other independent Melaleuca businesses."
> *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Ex.C,* Clerk's Record on Appeal, page 57

On April 29, 2009, Melaleuca filed this action in Bonneville County against the Foellers alleging that the Foellers committed tortious acts against Melaleuca which interfered with Melaleuca's agreement with other Independent Marketing Executives and/or Customers. The Complaint also alleges that the Foellers violated Policy 20 of Melaeuca's *Statement of Policies* in the IMEA Agreement by recruiting other Melaleuca Independent Marketing Executives into another network marketing company named Max International ("Max").

The Complaint seeks damages, but it does not state any specific damages caused by the Foellers, nor does the Complaint specify a dollar value of alleged damages. *See* Ex.A, Armstrong Affidavit. Rather, the Complaint generally alleges that "[t]he actions of Defendants have caused, and will continue to entitled to recover from Defendants all past and future costs, damages, and losses incurred as a result of the improper actions of Defendants, in an amount to be proven at the time of trial or at the time judgment is requested." *Id.* at para. 9.

Melaleuca testified it would be difficult to measure and state the amount of its damages, and that therefore it was going to engage a "special consultant" to help or assist Melaleuca in calculating its damages. *See* Exhibit C of Armstrong Affidavit, page 110, lines 19 through 23. As of the cut-off date for all fact and expert discovery, Melaleuca had not disclosed the amount of its damages, nor provided any evidence of damages except to state the amount of commissions paid. *See Affidavit of Richard J. Armstrong,* Clerk's Record on Appeal, page 333.

STANDARD OF REVIEW

"In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. *Am. Falls Reservoir Distr. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 869, 154 P. 3d 433, 440 (2007); *State v. Rubbermaid Incorporated,* 129 Idaho 353, 355-356, 924 P.2d 615, 617-618 (1996); *Thomson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994). Upon review, the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party, *Id.; Am. Falls Reservoir Distr. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 869, 154 P. 3d 433, 440 (2007). Summary Judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCoy v. Lyons,* 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds reach different conclusions,

summary judgment must be denied. *Am. Falls Reservoir Distr. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 869, 154 P. 3d 433, 440 (2007).

ARGUMENT

I. The district court erred by granting monetary damages based upon the defense of material breach of contract.

In its Opinion and Order on Plaintiff's Motion for Reconsideration, the district court granted Summary Judgment in favor of Melaleuca in the amount of $23,856.41 CDN based upon its conclusion that "[i]n this particular case, Melaleuca was unaware of the breach until after they had already paid the Foellers $23,856.41 CDN in commissions and therefore are entitled to, as damages, repayment of that exact amount."

The court did not require any evidence showing that the amount of commissions paid bore any relation to actual damages suffered by Melaleuca. Melaleuca never provided any such evidence. Instead the court reasoned that "[t]he actions of the Foellers clearly breached the IMEA and that breach was material. Consequently, "Melaleuca's performance, specifically that of the payment of commissions to the Foellers, was excused."

The district court's decision is based upon *J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996) The District Court held:

> Without considering the argument now made by Melaleuca that commissions paid to marketing executives generally are not tied to any specific sales activity undertaken by them, the Court is now persuaded that Policy 20(c)(i) simply excuses Melaleuca from performing under a contract that has been breached by the other party. As cited by Melaleuca, the Idaho Court of Appeals has clearly held that "[i]f a breach of contract is material, the other party's performance is excused." *J.P. Stravens Planning Associates, Inc. v. City of Wallace,* 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct.App 1996) (citing *Ervin Constr. Co. v. Van Orden,* 125 Idaho 695, 700, 874 P.2d 506, 511 (1993)). "A substantial or material breach

> of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *J.P Stravens,* 129 Idaho at 545, 928 P.2d at 49 (quoting *Ervin Const. Co.,* 125 Idaho at 700, 874 P.2d at 511.
> *Opinion and Order on Plaintiff's Motion for Reconsideration*, Clerk's Record on Appeal, p. 593.

The problem with the court's application of *J.P. Stravens* as a means of establishing the existence and the amount of damages is that *J.P. Stravens* and similar cases only provide for a defense excusing performance. In *J.P. Stravens*, "[t]he city did not seek an affirmative recovery against Stravens; it sought only a judgment relieving the city of any obligation to pay Stravens' claimed fees. **Therefore, the city had no need to prove damages."** *J.P. Stravens,* 129 Idaho at 545, 928 P.2d at 49. (Emphasis added.) Further, the court explained in a footnote: "Curiously, and inappropriately, the city pleaded its breach of warranty defense as a 'counterclaim,' even though the city did not allege entitlement to recover any damages from Stravens. " *Id.* at FN1.

The materiality of a breach is not relevant when determining whether a plaintiff is entitled to monetary damages or the amount of any such damages. The question of materiality only arises when the Plaintiff pursues a remedy other than monetary damages, such as the rescission of the contract, or when a Defendant raises a Plaintiff's breach of contract as a defense to enforcement of the contract. *See J.P. Stravens; Mountain Restaurant Corp. v. Parkcenter Mall Associates,* 122 Idaho 261, 833 P.2d 119 (Ct.App. 1992); *State c. Chacon,* 198 P.3d 749 (Idaho Ct.App. 2008); *Blaser v. Cameron*, 829 P.2d 1361 (Idaho Ct.App. 1992). The Plaintiff's burden to provide its damages is not ameliorated by the materiality of the breach.

A plaintiff must prove the fact that it has been damaged as well as the amount of damages. Furthermore, both must be proven to a reasonable certainty. *Powell v. Sellers,* 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997) (citing *Wing v. Hulet,* 106 Idaho 912, 919, 684 P.2d 314, 321 (Ct. APP. 1984); *Eliopulos v. Kondo Farms, Inc.,* 102 Idaho 915, 919, 643 P.2d 1085, 1089 (Ct. App. 1982) ("Damages, and the amount thereof, must be proven to a reasonable certainty.") (Emphasis added). Thus, "the measure of damage – as well as the fact of damage – must be proven beyond speculation." *Wing,* 106 Idaho at 919, citing *Eliopulos,* 102 Idaho 915.

When a plaintiff claims lost profits as damages, the foregoing still applies. "Compensatory damages for lost profits and future earnings must be shown with a reasonable certainty." *Todd v. Sullivan Const., LLC,* 146 Idaho 118, 122, 191 P.3d 196, 200 (Idaho 2008) (emphasis added), quoting *Inland Group of Companies, Inc. v. Providence Washington Ins. Co.,* 133 Idaho 249, 257, 985 P.2d 674, 682 (Idaho 1999). "Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation." *Griffith v. Clear Lakes Trout Co., Inc.,* 143 Idaho 733, 740, 152 P.3d 604, 611 (2007). And "reasonable certainty requires more than a mere estimate of net profit as a percentage of gross income. There must generally be supporting evidence of overhead expenses or other costs of producing income." *B & F Inc. v. Intermountain Gas Co.,* 99 Idaho 730, 732, 588 P.2d 458, 460 (1978).

Melaleuca's Complaint asserts intentional interference with a prospective economic advantage and/or tortious interference with a contract. Both torts require a plaintiff to establish

damages. *See Wesco Autobody Supply, Inc. v. Ernest,* 149 Idaho 881, 893, 242 P.3d 1069, 1081 (Idaho 2010), *reh'g denied* Nov. 26, 2010) ("To establish a claim for intentional interference with a prospective economic advantage, [plaintiff] must show: (1) the existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure beyond the fact of the interference itself, and (5) resulting damage to the plaintiff whose expectancy has been disrupted."); *and Id.* at 1083, *quoting Bybee v. Isaac,* 145 Idaho 251, 259, 178 P.3d 616, 624 (Idaho 2008) ("Tortious interference with contract has four elements: '(1) the existence of a contract; (2) knowledge of the contract on the part of the defendant; (3) intentional interference causing a breach of contract; and (4) injury to the plaintiff resulting from the breach.'")

In the absence of evidence regarding the fact and amount of any damage alleged to have occurred in this case, Melaleuca's claim for breach of contract must fail. The district court's decision on the Plaintiff's motion for summary judgment was correct. The decision granting Summary Judgment and the Motion for Reconsideration should be reversed.

II. The district court erred by failing to determine that the application of Policy 20 constitutes an unlawful penalty or forfeiture in the absence of evidence that Melaleuca suffered any actual damages and the amount of any such damages.

"Historically, courts of equity developed a rule, later adopted by courts of law, that contractual clauses prescribing penalties for a breach of contract would not be enforced because of the potential for over-reaching and unconscionable bargains . . . . Modern courts continue to refuse to enforce contract clauses that appear designed to deter a breach or to punish the

breaching party rather than to compensate the injured party for damage occasioned by the breach." *Magic Valley Truck Brokers, Inc. v. Meyer,* 133 Idaho 110, 117, 982 P.2d 945, 952 (Idaho Ct.App. 1999) (citations omitted).

It is a long-established principle in Idaho that "[e]quity abhors forfeitures." *Stringer v. Swanstrum,* 66 Idaho 752, 760, 168 P.2d 826, 830 (Idaho 1946), and that '[e]quity will not grant specific performance of a forfeiture unless the failure to do so would lead to an unconscionable result." *Sullivan v. Burcaw,* 35 Idaho 755, 208 P. 841 (Idaho 1922), *as quoted in Graves v. Cupic,* 75 Idaho 451, 456, 272 P.2d 1020, 1023 (Idaho 1954). *See also Dohrman v. Tomlinson,* 88 Idaho 313, 319, 399 P.2d 255, 259 (Idaho 1965) ("Forfeitures are abhorrent to the law and all intendments are against them."); and *Magic Valley Truck Brokers,* 133 Idaho at 117, 982 P.2d at 952.

In its original Order on Plaintiff's Motion for Summary Judgment, the district court recognized that in the absence of proof related to Melaleuca's damages, the application of Policy 20 constitutes such a penalty:

> Melaleuca states that the [$23,856.41] amount requested is reasonable because it exactly matches the damages Melaleuca suffered as a result of paying commissions to the Foellers. **This argument is unconvincing based on the evidence currently before this court.** Melaleuca seeks to retroactively take money paid to the Foellers for sales commissions; there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers' work as contractors for Meleleuca or that these are recognizable damages. Rather, **it appears that, lacking other evidence, Policy 20(c) acts solely to "deter a breach or to punish the breaching party."**
> *Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment, entered December 1, 2010,* Clerk's Record on Appeal, page 58.

In its opinion on reconsideration, the district court determined that:

> Without considering the argument now made by Melaleuca that commissions paid to marketing executives generally are not tied to any specific sales activity undertaken by them, the Court is now persuaded that Policy 20(c)(i) simply excuses Melaleuca from performing under a contract that has been breached by the other party. As cited by Melaleuca, the Idaho Court of Appeals has clearly held that "[i]f a breach of contract is material, the other party's performance is excused." *J.P. Stravens Planning Associates, Inc. v. City of Wallace,* 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct.App 1996) (citing *Ervin Constr. Co. v. Van Orden,* 125 Idaho 695, 700, 874 P.2d 506, 511 (1993)). "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *J.P Stravens,* 129 Idaho at 545, 928 P.2d at 49 (quoting *Ervin Const. Co.,* 125 Idaho at 700, 874 P.2d at 511.
> *Opinion and Order on Plaintiff's Motion for Reconsideration, entered December 21, 2011,* Clerk's Record on Appeal, page 593.

The court improperly relied upon the contract defense of material breach rather than requiring proof of damages. This reasoning is incorrect for the same reasons described above.

In light of its failure to provide any evidence of damage, this Court cannot determine at this juncture whether the forfeiture policies, at least as applied to Defendants, are unenforceable penalties. Melaleuca is obligated to show that the penalty it seeks to enforce bears a reasonable relation to its alleged injuries. Melaleuca must have provided evidence showing that there is no material factual dispute calling into question its assertion that its forfeiture policy is valid and enforceable. It has not done so. There is no evidence that the amount of commissions paid to Defendants after their alleged breaches of contract is a reasonable estimate of the damage Melaleuca alleges it has suffered. According to Ms. Foeller, Melaleuca received a substantial benefit as a result of her being a marketing executive, even during the time she allegedly violated Policy 20:

> [t]he $1 .7 million [paid to me over the years] was directly related to commissions on product purchased by my organization. Aside from bonuses earned by growing the organization, all income earned was from commissions for product that my organization purchased. For example, for the month of September 2008, the last month I received compensation, my organization produced 67,089 points. This equates to at least $140,000 paid to Melaleuca for product by my organization. From these purchases, I received $167.40for "pool" money, $1,200 for a car allowance, and $6,312. 83for commissions on my organization.
> Affidavit of Natalie Foeller, filed November 9, 2011, Clerk's Record on Appeal, page 448.

Thus, the sale of products that led to the payment of Defendants' commissions resulted in sales to Melaleuca, through which it apparently obtained a profit totaling $132,319.77 for the month of September 2008 ($140,000 - $6,312.83 - $1,200 - $167.40 = $1 32,3 19.77).

Granting summary judgment to Melaleuca solely on the basis of the amount of commissions paid was not appropriate. Further, since Melaleuca has failed to provide any evidence of its damages, the district court's decision to deny the Foellers' Motion for Summary Judgment was also inappropriate and should be reversed.

ATTORNEY'S FEES ON APPEAL

The Foellers are entitled to recover their attorney fees and court costs incurred on appeal pursuant to Idaho Code sections 12-120(3). This matter arises out of a commercial transaction.

CONCLUSION

For the foregoing reasons, the Foellers respectfully request that the district court's decision to grant Melaleuca's Motion for Reconsideration, to grant summary judgment in favor of Melaleuca, and to deny the Foeller's Motion for Summary Judgment be reversed by this Court.

DATED This 14 day of December, 2012.

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J. Justin May
Attorneys for Rick and Natalie Foeller

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 14 day of December, 2012 he caused two true and correct copies of the Appellant's Brief to be served upon each of the parties to the appeal by serving the following by the indicated method:

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